(1)

00-1768

~~00-1707~~ MAY 23 '01

No. _____

In The

Supreme Court of the United States

SUSAN LUDWIG,

Petitioner,

v.

NORTHWEST AIRLINES,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

JIM WAIDE
(*Counsel of Record*)
WAIDE & ASSOCIATES, P.A.
Attorneys at Law
Post Office Box 1357
Tupelo, Mississippi 38802
Telephone: (662) 842-7324
Facsimile: (662) 842-8056

Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

51 pp

QUESTIONS PRESENTED

1. DOES AN EEOC DETERMINATION FINDING REASONABLE CAUSE OF EMPLOYMENT DISCRIMINATION CREATE AN ISSUE OF MATERIAL FACT, SUCH THAT IT IS IMPROPER TO GRANT A MOTION FOR SUMMARY JUDGMENT IN FAVOR OF THE EMPLOYER?

2. WHERE A COURT OF APPEALS AFFIRMS A SUMMARY JUDGMENT BY INCORPORATING A DISTRICT COURT OPINION WHICH PRE-DATED *REEVES V. SANDERSON PLUMBING PRODUCTS, INC.*, 530 U.S. 133 (2000), AND WHERE THE DISTRICT COURT OPINION IS INCONSISTENT WITH *REEVES*, SHOULD THIS COURT GRANT CERTIORARI AND REVERSE IN ORDER TO REQUIRE COMPLIANCE WITH THIS COURT'S PRECEDENTS?

3. IN AN EMPLOYMENT DISCRIMINATION CASE, SHOULD A DISTRICT COURT, WHEN CONSIDERING A SUMMARY JUDGMENT MOTION, GRANT DEFERENCE TO AN EMPLOYER'S ALLEGED SAFETY CONCERNS, RATHER THAN ALLOWING THE TRIER OF FACT TO DETERMINE THE VERACITY OF THE EMPLOYER'S SAFETY CONCERNS JUST AS OTHER FACT ISSUES ARE DECIDED BY A JURY?

LIST OF PARTIES

The following is a list of all parties to the proceedings in the Court below, as required by Rule 24.1(b) and Rule 29.1 of the Rules of the Supreme Court of the United States.

1. Susan Ludwig,
   Petitioner;

2. Northwest Airlines,
   Respondent;

3. Jim Waide,
   Attorney for the Petitioner;

4. Timothy R. Thornton
   Attorney for Respondent;

6. Kristin L. Chong,
   Attorney for Respondent; and

7. Briggs & Morgan,
   Attorneys for Respondent.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

LIST OF PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISION INVOLVED 1

RULES OF CIVIL PROCEDURE INVOLVED 2

STATEMENT OF THE CASE 2

REASONS FOR GRANTING CERTIORARI 4

I. THE WRIT SHOULD BE GRANTED TO DETERMINE WHETHER AN EEOC DETERMINATION FINDING REASONABLE CAUSE OF EMPLOYMENT DISCRIMINATION CREATES AN ISSUE OF MATERIAL FACT, SUCH THAT IT IS INAPPROPRIATE TO GRANT AN EMPLOYER'S MOTION FOR SUMMARY JUDGMENT 4

II. THE WRIT SHOULD BE GRANTED AND THE CASE REVERSED IN LIGHT OF THE COURT OF APPEALS' INCORPORATION OF THE DISTRICT COURT'S OPINION WHICH PREDATED *REEVES V. SANDERSON PLUMBING PRODUCTS, INC.*, 530 U.S. 133 (2000), AND WHICH IS INCONSISTENT WITH *REEVES* ... 8

TABLE OF CONTENTS – Continued

Page

III. THE WRIT SHOULD BE GRANTED TO CORRECT THE COURT OF APPEALS' AND DISTRICT COURT'S ERRONEOUS FINDING THAT SPECIAL DEFERENCE IS DUE AN AIRLINE-EMPLOYER'S ALLEGED SAFETY CONCERNS INSTEAD OF ALLOWING THE JURY TO DETERMINE WHETHER SAFETY OR DISCRIMINATION WAS THE REAL REASON FOR THE EMPLOYER'S EMPLOYMENT DECISION 13

CONCLUSION 15

APPENDIX

Court of Appeals' Opinion Affirming Grant of Summary Judgment ..... App. 1

District Judge's Opinion Granting Summary Judgment ..... App. 3

Court of Appeals' Order Denying Rehearing ..... App. 31

EEOC Finding of Reasonable Cause ..... App. 32

TABLE OF AUTHORITIES

Page

CASES:

Barfield v. Orange County, 911 F.2d 644 (11th Cir. 1990) 6

Cervantes v. Wal-Mart Stores, Inc., 2001 U.S. App. LEXIS 63 at 10 (10th Cir. 2001) 6

Coleman v. The Quaker Oats Company, 232 F.3d 1271 (9th Cir. 2000) 5

Gifford v. The Atchison Topeka and Santa Fe Railway Co., 685 F.2d 1149 (9th Cir. 1992) 5

Kremer v. Chemical Construction Corp., 456 U.S. 461 (1981) 7

Nunez v. Superior Oil Co., 572 F.2d 1119 (5th Cir. 1978) 14

Murname v. American Airlines Inc., 667 F.2d 98 (D.C. Cir. 1981) 13

Paolitto v. Brown, 151 F.3d 60 (2nd Cir. 1998) 6

Plummer v. Western International Hotel Co., 656 F.2d 502 (9th Cir. 1981) 5

Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133 (2000) ..... *passim*

Rizzo v. Children's World Learning Center, 213 F.3d 289 (5th Cir. 2000) 14

Smith v. Universal Services, Inc., 454 F.2d 154 (5th Cir. 1972) 5

United States v. Prouse, 945 F.2d 1107 (8th Cir. 1991) 10

University of Tennessee v. Elliott, 478 U.S. 778 (1986) ...7, 8

TABLE OF AUTHORITIES – Continued

Page

Walker v. Nations Bank of Fla., NA, 53 F.3d 1548 (11th Cir. 1995) 6

Walker v. Thompson, 214 F.3d 615 (5th Cir. 2000) 14

Williams v. The Nashville Network, 132 F.3d 1123 (6th Cir. 1997) 6

OTHER AUTHORITIES

28 U.S.C. § 1254(1) 1

42 U.S.C. § 1981a(b)(1) 7

42 U.S.C. § 2000(e) 1

Federal Rule of Civil Procedure 56(c) 2

Federal Rules of Evidence, 403 n.5 6

J. Cronin, *Your Flight Questions Answered*, p. 85 11

4 K. Davis, *Administrative Law Treatise*, § 21.9, p. 78 (2d ed. 1983) 7

Eric Schnapper, *Judges Against Juries, Appellate Review of Federal Jury Verdicts*, 1989 Wisc. L. Rev. 227 14

OPINIONS BELOW

The Court of Appeals' Opinion affirming the grant of summary judgment for the employer (Respondent), is attached hereto as App. 1 through App. 2. The District Court's Opinion granting summary judgment for Respondent is published at 98 F.Supp.2d 1057, and is attached hereto as App. 3 through App. 30. The Court of Appeals' Order Denying Petition for Rehearing is attached hereto as App. 31. The EEOC determination that Petitioner was the victim of willful sex discrimination is attached as App. 32 through 35.

JURISDICTION

This Court has jurisdiction to review the decision of the United States Court of Appeals for the Eighth Circuit entered on January 5, 2001, App. 1, Petition for Rehearing denied on February 22, 2001, App. 31, by a Writ of Certiorari under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Civil Rights Act of 1964, 42 U.S.C. § 2000(e) reads, in part:

> . . . It shall be an unlawful employment practice for an employer – (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to

his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; . . .

RULES OF CIVIL PROCEDURE INVOLVED

Federal Rule of Civil Procedure 56(c) reads, in part:

. . . The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

STATEMENT OF THE CASE

Petitioner Susan Ludwig has been employed by Respondent as a flight attendant for over twenty-five (25) years. She holds an airline transport pilot's license, and a flight engineer rating. She has over 1800 flight hours of experience. Exhibits "F" and "Y"; Ludwig Affidavit. This case arises out of Respondent's rejection of Petitioner's application for an airline pilot position in 1995, when Respondent filled pilot positions with applicants from among its own employees. Exhibit "Y"; Fouchee depo., p. 17.

The District Court granted Respondent's motion for summary judgment, App. 29, and the Court of Appeals

affirmed on the basis of the District Court's Opinion. App. 2.

The District Court Opinion pre-dated *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000) and did not correctly anticipate *Reeves* since it accepted as true movant's summary judgment evidence, and omitted crucial facts supporting non-movant (Petitioner).

The District Court Opinion omits the Equal Employment Opportunity Commission determination, which reads, in part:

> Examination of the evidence, both documentary and testimonial, indicates that there is reasonable cause to believe that violations of the statutes have occurred. The Respondent discriminated against the charging party by applying screening criteria during the 1995 internal pilot hiring process to her that was different from that applied to her male co-workers who were promoted to the pilot position. The evidence established that the charging party is a 45 year old white female, union employee who has been employed with the Respondent since January, 1974. Evidence supports the conclusion that the charging party, Susan Ludwig, was not promoted to the pilot training program position opening in 1995 because of her gender. The evidence established that the Respondent promoted less qualified male co-workers to the pilot training positions open in 1995. Evidence establishes that during the 1995 pilot hiring process, the charging party held a valid air-transport pilot license, a full flight engineer's certificate, had completed over 1800 hours of flight time as pilot or second in

> command, and was more qualified or as qualified in the areas of attendance and job performance than the successful male candidates. I, therefore, conclude that the Respondent, willfully, and with reckless disregard of the requirements of law, discriminated against the charging party as alleged.

App. 33-34.

Besides omitting the EEOC determination of discrimination, the District Court Opinion also omits other facts supporting Petitioner's claim of discrimination. These omitted facts will be stated in Reason II.

In granting summary judgment, the District Court relied upon a purported need for special deference for a commercial airline's hiring decisions because of the need to protect public safety. App. 14.

REASONS FOR GRANTING CERTIORARI

REASON I.

THE WRIT SHOULD BE GRANTED TO DETERMINE WHETHER AN EEOC DETERMINATION OF REASONABLE CAUSE CREATES AN ISSUE OF MATERIAL FACT, SUCH THAT IT IS INAPPROPRIATE TO GRANT AN EMPLOYER'S MOTION FOR SUMMARY JUDGMENT.

After stating facts forming the basis of its conclusion, the EEOC determined that:

> The Respondent, willfully, and with reckless disregard for the requirements of the law, discriminated against the Charging Party as alleged.

App., p. 34.

By granting summary judgment for the Respondent, without acknowledging the existence of this crucial EEOC finding, the Eighth Circuit Court of Appeals differs with other circuits. *Gifford v. The Atchison Topeka and Santa Fe Railway Co.*, 685 F.2d 1149, 1156 (9th Cir. 1992)[1] held:

> The EEOC, after an impartial investigation, found reasonable cause to believe that Gifford had been treated differently than similarly situated male employees. . . . The EEOC's report was sufficient at least to create an issue of material fact on this question. It was therefore improper for the trial court to resolve the issue on summary judgment.

The Eighth Circuit's approval of the grant of summary judgment contrasts with the Fifth Circuit's view of an EEOC reasonable cause determination. *Smith v. Universal Services, Inc.*, 454 F.2d 154, 157 (5th Cir. 1972):

> To ignore the manpower and resources expended on the EEOC investigation and the expertise acquired by its field investigators in the area of the discriminatory employment practices would be wasteful and unnecessary. The fact that an investigator, trained and experienced in the area of discriminatory practices and the various methods by which they can be secreted, has found that it is likely that such an

---

[1] However, *Coleman v. The Quaker Oats Company*, 232 F.3d 1271 (9th Cir. 2000) held: "Nor does EEOC reasonable determination create an issue of material fact." But see *Plummer v. Western International Hotel Co.*, 656 F.2d 502, 505 (9th Cir. 1981) (EEOC evaluation is "highly probative").

> unlawful practice has occurred, is highly probative of the ultimate issue involved in such cases.

The Tenth Circuit also disagrees with the Eighth Circuit decision to ignore an EEOC finding when ruling upon summary judgment. *Cervantes v. Wal-Mart Stores, Inc.*, 2001 U.S. App. LEXIS 63 at 10 (10th Cir. 2001) held:

> Clearly the EEOC report has probative value. On summary judgment, the report should have been addressed . . . .

The Sixth and Eleventh Circuits also hold that such EEOC determinations constitute substantial evidence of employment discrimination.[2] *Williams v. The Nashville Network*, 132 F.3d 1123, 1128-29 (6th Cir. 1997); *Walker v. Nations Bank of Fla., NA*, 53 F.3d 1548, 1554-55 (11th Cir. 1995); *Barfield v. Orange County*, 911 F.2d 644, 649 (11th Cir. 1990).[3]

---

[2] Contra, *Paolitto v. Brown*, 151 F.3d 60 (2nd Cir. 1998) (disagreeing with "minority view" of per se admissibility of EEOC determination).

[3] When employment discrimination cases proceed to trial, there is also disagreement in the Circuits on the question of admissibility of EEOC determinations. For example, *Barfield v. Orange Co.*, 911 F.2d 644, 649-650 (11th Cir. 1990) noted: "Our sister circuits are split on the proper method for determining whether an EEOC report will be admissible in an employment discrimination case tried to a jury. The Ninth Circuit appears to have adopted a per se rule that 'a plaintiff has a right to introduce an EEOC probable cause determination in a Title VII lawsuit, regardless of whether other claims are asserted, *or whether the case is tried before a judge or jury.*' (citations omitted). The Fifth Circuit approaches that position, largely focusing a challenge under Fed.R.Evid. 403 n.5, by reserving the possibility that an EEOC determination could be excluded if . . .

As noted in *Kremer v. Chemical Construction Corp.*, 456 U.S. 461, N.22 (1981) (Blackman, J. dissenting):

> [C]omplainant in an EEOC charge evidently must present more proof to establish probable cause than to survive a summary judgment motion in federal court. Probable cause exists when there is "reasonable ground of suspicion supported by facts and circumstances strong enough in themselves to warrant a cautious man into belief that the law is being violated." (citations omitted)

The Eighth Circuit decision to give no credence to an EEOC finding is especially troublesome since the EEOC went further than a mere "reasonable cause" or "probable cause" finding. Instead, it found Respondent acted "willfully" and "with reckless disregard for the requirements of the law". This is the standard for punitive damages under 42 U.S.C. § 1981a(b)(1).

The Eighth Circuit's disregard of the EEOC determination conflicts with the policy of giving weight to determinations of federal administrative agencies as expressed in *University of Tennessee v. Elliott*, 478 U.S. 778, 798 (1986), quoting with approval of Professor Davis' work on administrative law:

> To the extent that administrative adjudications resemble courts' decisions – a very great extent – the law worked out for courts does and should apply to agencies. 4 K. Davis, *Administrative Law Treatise*, § 21.9, p. 78 (2nd Ed. 1983).

---

circumstances indicate lack of trustworthiness . . . ". "Other circuits, recognizing EEOC reports are not homogenous products; . . . have decided that the decision whether to admit an EEOC probable cause determination at a jury trial is in the discretion of the trial judge . . . ".

> The Restatement (Second) of Judgments § 83, p. 269 (1982), reaches a similar conclusion:
>
> 'Where an administrative forum has the essential procedural characteristics of a court, . . . its determination should be accorded the same finality that is accorded the judgment of a court.

By noting that administrative determinations, in certain situations, are accorded a *res judicata* effect, *Elliott* indicates deference should be given administrative determinations by a federal court. For a federal court to disregard an EEOC determination when deciding whether there exist questions of material fact is not consistent with the policy of according deference to determinations of a federal administrative agency charged with enforcing the statute at issue.

A lower court's decision to disregard an EEOC determination when considering a motion for summary judgment warrants this Court's review.

REASON II.

THE WRIT SHOULD BE GRANTED AND THE CASE REVERSED IN VIEW OF THE COURT OF APPEALS' INCORPORATION OF THE DISTRICT COURT OPINION WHICH PREDATED *REEVES V. SANDERSON PLUMBING PRODUCTS, INC.* THE DISTRICT COURT OPINION CONTRADICTS *REEVES* BY ACCEPTING AS CORRECT MOVANT'S EVIDENCE AND DISREGARDING NON-MOVANT'S EVIDENCE.

Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 120 S.Ct. 2097 (2000) resolved a conflict in the Courts

of Appeals in deciding which evidence a court may consider when ruling upon a summary judgment motion. *Reeves* held that a district court must not give credence to the evidence of the movant which is contradicted by nonmovant's evidence. 120 S.Ct. at 2110. The District Court Opinion violated this rule. It noted Respondent's evidence of disciplinary problems with Petitioner, but failed to note that there was no contemporaneous record of such problems, rather only affidavits executed for the purpose of this case. *See* Ludwig deposition and *see* Northwest H.R. Representative Emmeott deposition claiming performance problems, but attaching no contemporaneous records.

The District Court Opinion omits the fact that the Respondent ignored results of an objective test which females passed at a far higher rate than males. Fouchee depo., p. 19; Emmeott depo., p. 25. Sixty-seven (67%) percent of the female applicants, including Petitioner, passed this objective examination. However, only thirty-six (36%) percent of the male applicants passed the objective test. Emmeott depo., pp. 24-25. Furthermore, there is no discussion in the District Court's Opinion of the fact that after the results of the objective test were known to Respondent, it then discarded the objective test results and substituted subjective criteria in place of the initial objective test.

The District Court also omitted the devastating fact that had Respondent continued to use the objective test (known as the PSI), twenty-one (21) males but only two females would have been excluded. Emmeott supp. aff. The objective (PSI) test which disqualified an overwhelming number of males but only two females was replaced

by the consideration of an applicant's employment "background" because, according to Respondent, the objective test had eliminated some "good folks." Tice depo., pp. 15-16.[4]

Respondent justified Petitioner's disqualification based on her alleged poor employment background and attendance record. Chong aff., Exhibit "4." This alleged background included Respondent's claim that Petitioner had taken excessive amounts of leave.[5] Chong aff. But the District Court failed to mention that Petitioner's leave was all taken pursuant to Respondent's seniority rules, and Petitioner was never disciplined for attendance. *See* Emmeott depo. (Petitioner was "on border" of being disciplined for attendance).

The District Court failed to follow *Reeves* since it failed to draw permissible inferences favoring nonmovant. *Reeves*, 120 S.Ct. at 2110. For example, the District Court noted that Petitioner had failed the 1994 simulator test. But the District Court failed to note

---

[4] Among the "good folks" qualified under the new 1995 subjective background standard was a male applicant who had a felony conviction for flying one of Respondent's planes while drunk. *See United States v. Prouse*, 945 F.2d 1107 (8th Cir. 1991) (affirming criminal conviction of successful internal male applicant Prouse for flying a Northwest Airlines aircraft while intoxicated).

[5] Much of the Petitioner's approved leave was taken so she could complete her undergraduate studies at Harvard University where she graduated number one (grade point 3.92) in her liberal arts degree program. Petitioner is currently working on her master's thesis at Harvard, having completed all academic requirements for a master's of liberal arts degree in history at Harvard. Ex. "Y".

Respondent in 1995 hired two (2) male applicants who had also failed the 1994 simulator test, and that, according to Respondent, the 1994 simulator test could not have been the reason Petitioner was not hired since her "background" was the only reason Petitioner was not hired in 1995.[6] Emmeott depo., p. 85.

In relying on failure of the 1994 simulator test for this 1995 hiring, the District Judge also failed to give weight to the fact that Petitioner had both an airline transport pilot's license and a full flight engineer's rating with over 1,800 hours of flight experience. According to J. Cronin, *Your Flight Questions Answered*, p. 85:

> The final step and the ultimate and commercial flying license is the airline transport license – it's like the 'Ph.D. of aviation' . . . It is earned on the basis of experience, a written test, and a flight test, usually in a multi-engine airplane.

While affording deference to the airline's alleged safety concerns in hiring pilots, the District Court Opinion omits the fact that the objective test which Respondent disregarded, and which most female applicants (including Petitioner) passed, was a test specifically designed to assure that applicants had the necessary skills to fly safely. Kern depo., pp. 15-25, 27, 29, 444, 445.

The District Court also fails to mention the fact that this objective test was eliminated for internal applicants

---

[6] Many internal applicants failed the 1994 simulator test which was set with wind shear and severe turbulence in a DC9 simulator. The 1995 internal simulator test, which almost no one failed, was given in a 747 simulator. Ludwig affidavit, Ex. 430/EEOC.

over the objections of the senior legal member of the committee which had devised the hiring process, and that Respondent continued to use the objective test for external applicants. Tice depo., pp. 16, 18; Emmeott depo., p. 28.

The District Court also failed to draw proper inferences in favor of Petitioner when it omitted from its Opinion that at least five (5) of the male applicants who obtained pilot's positions had been disciplined for attendance and/or performance problems. Ex. DD.

By omitting so many facts and inferences favoring non-movant (Petitioner), by emphasizing movant's (Respondent's) evidence, and by omitting from its findings the crucial EEOC determination, the District Court did not correctly anticipate *Reeves*. *Reeves* had been decided by the time the Court of Appeals acted, but the Court of Appeals nevertheless affirmed on the basis of the pre-*Reeves*' District Court Opinion, thus disregarding *Reeves*. *Reeves* is of no effect if the lower courts ignore it.

REASON III.

THE WRIT SHOULD BE GRANTED TO CORRECT THE COURT OF APPEALS' AND DISTRICT COURT'S ERRONEOUS BELIEF THAT SPECIAL DEFERENCE SHOULD BE GIVEN AN EMPLOYER'S ALLEGED SAFETY CONCERNS RATHER THAN ALLOWING THE FACT-FINDER TO DETERMINE GENUINENESS OF THESE ALLEGED SAFETY CONCERNS.

In granting summary judgment, the court below has determined it is acceptable to deny applicants for commercial airline pilot positions a jury determination on the facts, which other potential employees receive. The District Court based its grant of summary judgment, in part, upon a special deference which it gave to the employer, since the airline industry was involved. The District Court stated:

> As aptly articulated by the Court of Appeals for the District of Columbia, '[T]he airline industry is one in which safety is of utmost importance. The staggering death tolls and resulting human suffering which have followed some of our nation's horrible airline disasters attest to this fact. Therefore, in our judgment, the airline industry must be accorded great leeway and discretion in determining the manner in which it may be operated most safely[.]' *Murname v. American Airlines Inc.*, 667 F.2d 98 (D.C. Cir. 1981). Accordingly, Northwest retains a wide degree of discretion when making decisions in the hiring of pilots who will ultimately be responsible for the safety of thousands of air travelers.

App. 14.

This rationale means that potential airline pilots have judges, not juries, decide the facts. In this case, Petitioner's evidence was that the Respondent disregarded the objective test which best determined airline pilot safety. There is nothing in Title VII of the Civil Rights Act of 1964 which indicates whether an issue of material fact exists depends upon whether the employer's articulated reason for its decision relates to public safety. There is no rule of law which says that a judge, rather than a jury, is best suited to determine whether considerations of public safety or discriminatory reasons motivated the employer. Instead, questions of motivation and intent are questions of fact for the jury. *Reeves*, 120 S.Ct. at 2110.

As the Fifth Circuit has observed, questions of the "main springs of human experience" are *fact* questions for the jury, and not questions of law for the Court. *Nunez v. Superior Oil Co.*, 572 F.2d 1119, 1126 (5th Cir. 1978); *accord, Walker v. Thompson*, 314 F.3d 615 (5th Cir. 2000) (common sense question of whether the employer took proper remedial measures was a question of fact for the jury not of law for the court); *Rizzo v. Children's World Learning Center*, 213 F.3d 289 (5th Cir. 2000) (common sense question of whether employee's conduct was a "direct threat" should not be decided as a matter of law, but was a fact question for the jury).

Similarly, the matter of the genuineness of the Respondent's claim of concern for public safety is a fact question, and labeling such an issue as an issue of law is inconsistent with the appropriate division of authority between judge and jury. *See* Eric Schnapper, *Judges*

Against Juries, Appellate Review of Federal Jury Verdicts, 1989 Wisc. L. Rev. 227.

CONCLUSION

This case represents an arbitrary refusal to give effect to an EEOC determination when deciding a motion for summary judgment. Additionally, it declines to follow *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000) and it improperly labels as an issue of law what should be an issue of fact. Review by this Court is warranted.

Respectfully submitted,

JIM WAIDE
(*Counsel of Record*)
WAIDE & ASSOCIATES, P.A.
Attorneys at Law
Post Office Box 1357
Tupelo, Mississippi 38802
Telephone: (662) 842-7324
Facsimile: (662) 842-8056

Counsel for Petitioner

App. 1

United States Court of Appeals, Eighth Circuit.

Susan LUDWIG, Appellant,

v.

NORTHWEST AIRLINES, INC., Appellee.

No. 00-2258.

Submitted Dec. 14, 2000.
Decided Jan. 5, 2001.

Appeal from the United States District Court for the District of Minnesota.

Before *LOKEN* and *MAGILL*, Circuit Judges, and *BATTEY*,[1] District Judge.

[UNPUBLISHED]

PER CURIAM.

**I Susan Ludwig (Ludwig) appeals [sic] the district court's[2] order granting summary judgment in favor of her employer, Northwest Airlines, Inc. (Northwest), in this employment discrimination action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, and the Minnesota Human Rights Act, Minn.Stat. § 363. After de novo review, *see Rose-Maston v. NME Hosps., Inc.*, 133 F.3d 1104, 1107 (8th Cir.1998), we conclude the district court's

---

[1] The Honorable Richard H. Battey, United States District Judge for the District of South Dakota, sitting by designation.

[2] The Honorable Paul A. Magnuson, United States District Judge for the District of Minnesota.

judgment was proper for the reasons stated in its thorough opinion. Accordingly, we affirm the judgment of the district court. *See* 8th Cir. R. 47B.

A true copy.

App. 3

United States District Court, D. Minnesota.

Susan LUDWIG, Plaintiff,

v.

NORTHWEST AIRLINES, INC., Defendant.

No. Civ. 98-1580PAM/FLN.

April 5, 2000.

Stephen W. Cooper, Kathryn J. Cima, Stacey R. Everson, Eric D. Bull, Cooper Law Office, Minneapolis, MN, for Susan Ludwig, Plaintiff.

Timothy Robert Thornton, Lauren Elizabeth Lonergan, Kristin L. Chong, Briggs & Morgan, Minneapolis, MN, for Northwest Airlines, Inc., Defendant.

MEMORANDUM AND ORDER

MAGNUSON, Chief Judge.

This matter is before the Court upon Defendant Northwest Airlines, Inc.'s Motion for Summary Judgment. For the following reasons, the Court grants Defendant's motion.

BACKGROUND

Plaintiff Susan Ludwig ("Ludwig") has been a Northwest Airlines, Inc. ("Northwest") flight attendant since 1974. During her long tenure with Northwest she has had [sic] received numerous commendations for her work.[1]

---

[1] Ludwig states that she has received a "stack" of commendations. (*See* Pl.'s Mem. at 3.) Although she has

She has also been cited several times for attendance, performance, and behavioral difficulties. For example, between 1991 and 1995 Ludwig received five doctor's note advisories[2] and was either sick or on leave for most of 1995. (*See* Def.'s Mem. at 6; Def.'s Exs. 10-16; Emeott Aff.Ex. E.) She has also been involved in several incidents, which according to Northwest, evince problematic behavior. The first such incident was a security breach in Sacramento in which Ludwig disregarded FAA regulation by entering a secure area unescorted. (*See* Emeott Aff.Ex. A.) When told to leave the area, Ludwig allegedly behaved indignantly and defiantly, and was thereafter described by the manager on duty as a "very difficult person to deal with." (*See id.*) The second incident was also a [sic] classified as a security breach. According to the report, Ludwig called Crew Scheduling during a security alert to complain about staffing, but refused to identify herself, as required. (*See* Emeott Aff.Ex. B.) Once again, Ludwig was reportedly hostile, unprofessional, and defiant during the encounter. (*See id.*) Third, Ludwig failed to account for $47 of in-flight liquor sales, and

---

received numerous commendations, the "stack" provided to the Court consisted primarily of duplicates and documents not constituting commendations. In fact, there were only 12 documents that could possibly qualify as commendations in the 44 documents provided by Ludwig. (*See* Pl.'s Ex. W.)

[2] A flight attendant will receive a doctor's note advisory if his or her sick leave exceeds three sick incidents in a twelve month period. (*See* Chong Aff.Ex. 2 at 14.2.) The advisory alerts employees that a doctor's note will be required the next time there is a sick incident. (*See id.*) This policy is designed to deter sick leave abuse. (*See* Def.'s Mem. at 6.)

thereafter failed to complete the required forms explaining the discrepancy in a timely manner. (*See* Emeott Aff.Ex. F.)

The fourth incident occurred in the 1980's during a flight simulator test. (*See* Pl.'s Ex. CC.) According to instructor Stephen Wilkinson, after Ludwig "decisively" failed the test, she proceeded to become "extremely abusive" toward him, as well as the presiding Federal Aviation Administration ("FAA") inspector. (*Id.*) Wilkinson ultimately described her as "so belligerent, so unable to face criticism, so narrowly focused as to be unable to realize dangerous situations." (*Id.*)

In 1994, Ludwig applied for a pilot position through Northwest's internal hiring process. The three-step process first required applicants to meet minimum objective criteria, which included having a commercial pilot's license, a flight engineer rating or a passing score on a flight engineer's written exam, and 1000 total flight hours. (*See* Pl.'s Ex.G.) If the applicant met these criteria, he or she proceeded to Phase I of the process, which consisted of a standardized battery of tests administered to measure general cognitive ability, intelligence, psychological characteristics, Crew Resource Management ("CRM") skills,[3] and interpersonal skill performance. (*See*

---

[3] CRM skills include: stress tolerance, leadership, group cohesiveness, teamwork, personality, communications skills, and assertiveness. The Federal Aviation Administration ("FAA") and the National Transportation Safety Board ("NTSB") have attributed a significant percentage of major carrier accidents to CRM failures. (*See* Def.'s Mem. at 2, n. 3.) Such skills are therefore considered to be of primary importance in any pilot candidate. (*See* Foushee Dep. at 41-44.)

Foushee Dep. at 9.) To measure these skills, Northwest administered the Multidimensional Aptitude Battery ("MAB") and the Personal Characteristics Inventory ("PCI"), both objective tests. (*See id.*) If the applicant passed through Phase I, he or she moved on to Phase II, which included a panel interview and a flight simulator test.

Although Ludwig met the minimum objective criteria and passed through Phase I of the process in 1994, she decisively failed the simulator test and was promptly eliminated from the application process. (*See* Emeott Dep. at 43.)

Ludwig reapplied for a pilot position in 1995. Once again, Northwest found that Ludwig met the minimum objective criteria, and she moved on to Phase I.[4] Ludwig also passed through the objective battery of tests administered in Phase I. After the Phase I tests had been scored, however, Northwest decided to supplement the application process with a background check. (*See* Emeott Dep. at 13, 23-25.) Northwest claims that its decision to supplement the Phase I process in this manner was prompted by the low "select-in" rate of both male and female applicants. (*Id.* at 25.) With the implementation of the background check, those individuals who had failed the Phase

---

[4] In fact, Ludwig did not meet the minimum threshold criteria because she did not satisfy the continuous employment requirement. (*See* Emeott Dep. at 51-53.) In particular, she was not at work for most of 1995, and there was a continuous three month period where she was not at work at all. (*See id.*) Nevertheless, Northwest waived the continuous employment requirement for her and allowed her to proceed to Phase I of the hiring process. (*See id.*)

I tests remained pilot candidates. According to Northwest, the background check was a better indicator of CRM skills and commercial pilot readiness than the objective tests previously administered. (*See* Foushee Dep. at 42-44; Kern Dep. at 35-36.) Ludwig, though, argues that the background check was implemented because too many women, and not enough men passed the Phase I battery of tests. In support of this accusation, she cites the negative effect the background check ultimately had on female applicants. For example, although six of the nine remaining females passed the Phase I objective tests, only five of the nine passed the background check (*See* Pl.'s Mem. at 12.)

Ludwig was one of the females who passed through the objective testing in Phase I, but failed to meet the background check criteria. Northwest cites her high absenteeism, low CRM skills, troublesome attitude, and poor performance as reasons for her elimination. (*See* Def.'s Mem. at 6-8.) As noted by Robert Tice ("Tice"), senior labor counsel for Northwest, "[p]oor attendance as a flight attendant [is regarded as] an indicator of future performance in a piloting position. And poor performance with respect to getting along with fellow employees, respecting rules and the authority of governmental agencies, etcetera, [ ] is extremely important to predicting future performance as a pilot." (Tice Dep. at 57.) Ludwig contends that she was eliminated because she is female.

On September 3, 1996, Ludwig filed a charge with the Equal Employment Opportunity Commission ("EEOC")

alleging discrimination on the basis of sex for her elimination from the pilot hiring process in 1995 and retaliation for her complaints about the 1994 hiring process. Ludwig has never alleged that she was discriminated against during the 1994 hiring process. The EEOC issued a Right to Sue letter and Ludwig promptly sued Northwest alleging that she was discriminated against on the basis of sex in violation of Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e, and the Minnesota Human Rights Act, Minn.Stat. § 363.01 ("MHRA").

On July 11, 1997, Ludwig filed a second EEOC complaint, alleging that she was retaliated against for filing her discrimination claim. In particular, she alleged that she was unfairly denied a transfer and was generally held to a higher standard than similarly situated employees who have not filed such complaints. Once again, Ludwig was issued a Right to Sue letter by the EEOC. Thereafter, she filed a second suit alleging retaliation in violation of Title VII and the MHRA; negligent supervision, training, retention and hiring; and intentional infliction of emotional distress. The two cases were consolidated on January 27, 1999. On September 3, 1999, Northwest filed the instant Motion for Summary Judgment.

DISCUSSION

A. Standard

Summary judgment is proper if there are no disputed issues of material fact and the moving party is entitled to judgment as a matter of law. *See* Fed.R.Civ.P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *Unigroup, Inc. v. O'Rourke Storage & Transfer*

Co., 980 F.2d 1217, 1219-20 (8th Cir.1992). The Court must view the evidence and the inferences that may be reasonably drawn from the evidence in the light most favorable to the nonmoving party. *See Enterprise Bank v. Magna Bank*, 92 F.3d 743, 747 (8th Cir.1996). However, as the United States Supreme Court has stated, "summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed to secure the just, speedy, and inexpensive determination of every action." *Celotex*, 477 U.S. at 327, 106 S.Ct. 2548 (quotation omitted).

The moving party bears the burden of showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. *See Enterprise Bank*, 92 F.3d at 747. The nonmoving party must demonstrate the existence of specific facts in the record that create a genuine issue for trial. *See Krenik v. County of Le Sueur*, 47 F.3d 953, 957 (8th Cir.1995). A party opposing a properly supported motion for summary judgment may not rest upon mere allegations or denials, but must set forth specific facts showing that there is a genuine issue for trial. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); *Krenik*, 47 F.3d at 957.

B. Title VII and MHRA Claims

1. *Disparate Treatment*

Title VII and MHRA disparate treatment claims are analyzed under the three-step framework articulated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-804, 93

S.Ct. 1817, 36 L.Ed.2d 668 (1973). *See Lee v. Minnesota*, 157 F.3d 1130, 1133 (8th Cir.1998) (citing *Feges v. Perkins Restaurants, Inc.*, 483 N.W.2d 701, 710 (Minn.1992)). The first prong requires the plaintiff to establish a prima facie case of discrimination. *See McDonnell Douglas*, 411 U.S. at 802, 93 S.Ct. 1817. If the plaintiff meets this obligation, the burden shifts to the defendant to proffer a nondiscriminatory explanation for its conduct. *See id.* If the defendant meets this burden, the prima facie presumption of discrimination disappears. The burden then reverts to the plaintiff to establish that the defendant's proffered legitimate reason was pretextual. *See id.* at 804, 93 S.Ct. 1817.

"The burden of establishing a prima facie case of disparate treatment is not onerous." *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981). A plaintiff must merely prove by a preponderance of the evidence that: 1) she was a member of a protected class; 2) she was qualified for the position; 3) she was not hired for that position; and 4) the employer filled the position with a person not in the protected class. *See McDonnell Douglas*, 411 U.S. at 802, 93 S.Ct. 1817. It is undisputed that Ludwig meets the first, third, and fourth criteria, therefore, the only real issue is whether Ludwig was "qualified" to be a Northwest pilot. Ludwig argues that she was qualified for the position because she met the minimum objective criteria, such as having a commercial pilot's license, a flight engineer rating, and 1000 total flight hours. In order to become a commercial pilot for Northwest, however, applicants are also required to possess a certain measure of general cognitive ability, intelligence, psychological characteristics, CRM skills, and interpersonal skills. In addition, the

applicant must also be able to pass a flight simulator test. Northwest argues that Ludwig was not qualified to be a Northwest pilot because, in its opinion, she could not meet all of these criteria.

In order to be deemed "qualified" at this stage of the analysis, Ludwig need only establish that she met the minimum "objective qualifications for the job." *Legrand v. Trustees of Univ. of Arkansas at Pine Bluff*, 821 F.2d 478, 481 (8th Cir.1987); *see also Hase v. Missouri Div. of Employment Security*, 972 F.2d 893, 896 (8th Cir.1992) (holding that in order to establish a prima facie case under the *McDonnell Douglas* framework, a plaintiff must demonstrate that he meets the "minimum qualifications for the position"); *Axtel v. Northwest*, No. 97-2632, slip op. at 8 (D.Minn. June 30, 1999) ("While recognizing NWA's interest in evaluating a candidate's CRM and technical skills though [sic] an interview process, the law of this circuit makes clear that only objective criteria can be used when evaluating whether a plaintiff has made out a prima facie case."). Subjective qualifications of the employee are analyzed later, under step two of the analysis. *See Legrand*, 821 F.2d at 481 (citing *Lynn v. Regents of the Univ. California*, 656 F.2d 1337, 1344-45 (9th Cir.1981)).

Because it is clear that Ludwig met the minimum objective criteria for the position – that is, the posted qualifications – the Court concludes that Ludwig was in fact "qualified" for the position within the meaning of *McDonnell Douglas* and its progeny. Accordingly, the Court finds that Ludwig has established a prima facie case of discrimination.

In order to rebut the presumption of discrimination, Northwest must proffer a legitimate non-discriminatory reason for its hiring decision. *See McDonnell Douglas,* 411 U.S. at 802, 93 S.Ct. 1817. Northwest has done just that by citing high absenteeism, low CRM skills, troublesome attitude, and poor performance as its reasons for eliminating Ludwig from the applicant pool. Accordingly, the Court concludes that Northwest has met its burden under the second step of *McDonnell Douglas.*

Because Northwest has successfully rebutted the presumption of discrimination, "the factual inquiry proceeds to a new level of specificity." *Burdine,* 450 U.S. at 255, 101 S.Ct. 1089. Ludwig bears the ultimate burden of persuading the Court that "she has been the victim of intentional discrimination." *Id.* at 256, 101 S.Ct. 1089. More specifically, in order to survive summary judgment Ludwig must proffer evidence of pretext – i.e., that her rejection was driven by discriminatory motives rather than legitimate business reasons. Ludwig may do this "directly, by persuading the court that a discriminatory reason more likely [than not] motivated the employer, or indirectly, by showing that the employer's proffered explanation is unworthy of credence." *Hase,* 972 F.2d at 896 (quoting *Burdine,* 450 U.S. at 256, 101 S.Ct. 1089).

Ludwig simply cannot meet this burden. She makes numerous conclusory statements that, if supported by the record, could possibly establish pretext. For example, "Defendant attempted to exclude Plaintiff at this early stage [Phase I], using a different application of the rules than was used for at least two male applicants." (Pl.'s Mem. at 5.) This averment, however, is not supported by

the record. Ludwig has supplied the Court with voluminous documentation about the other applicants, most of which is either indecipherable or unsupportive of her position. Through this evidence, Ludwig has utterly failed to establish that the male candidates were "similarly situated in all relevant respects." *Lanear v. Safeway Grocery*, 843 F.2d 298, 301 (8th Cir.1988). To the contrary, none of the male applicants had the same behavioral and performance difficulties as Ludwig. (*See* Pl.'s Ex. A.) In addition, Ludwig appears to have had the most consistent and recent attendance problems of any other applicant. (*See id.*; Pl.'s Mem. at 9; Def.'s Exs. 10-16; Emeott Aff.Ex. E.) Thus, she has failed to establish that the male candidates were similarly situated in all relevant respects.

Ludwig further alleges that "Defendant, then solely because it did not like the fact that certain men had failed[,] substituted the test with a less reliable, more subjective criteria." (Pl.'s Mem. at 18.) And, "[i]t appears however, that Northwest did not like the high proportion of females excelling on the test." (*Id.* at 6.) Again, neither of these statements are anything more than bald accusations, wholly conclusory and unsupported by the record. In fact, Northwest's decision to implement the background check resulted in the hiring of a female applicant who would otherwise have been eliminated from the process on the basis of her PCI score. (*See* Emeott Supp.Aff. § 4.)

Furthermore, Ludwig's conclusory allegations that she is eminently qualified to be a commercial airline pilot and that her employment file was scrutinized more vigorously than male applicants carries no weight in the Court's analysis. *See* Fed.R.Civ.P. 56(e) (stating that a

party opposing summary judgment may not rest on mere allegations, but must set forth specific facts showing that there is a genuine issue for trial). What does matter, however, is "whether the employer gave an honest explanation of its behavior." *Krenik*, 47 F.3d at 960. The Court is persuaded that Northwest has done just that.

> Moreover, given the substantial public safety implications attendant to the hiring of commercial airline pilots, the Court accords Northwest "considerable discretion" in making such decisions. *Axtel*, slip op. at 9. As aptly articulated by the Court of Appeals for the District of Columbia,
>
> [T]he airline industry is one in which safety is of the utmost importance. The staggering death tolls and resulting human suffering which have followed some of our nation's horrible air disasters attest to this fact. Therefore, in our judgment, the airline industry must be accorded great leeway and discretion in determining the manner in which it may be operated most safely[.]

Murnane v. American Airlines, Inc., 667 F.2d 98, 101 (D.C.Cir.1981). Accordingly, Northwest retains a wide degree of discretion when making decisions in the hiring of pilots who will ultimately be responsible for the safety of thousands of air travelers.

In sum, Ludwig's failure to affirmatively establish evidence of pretext, coupled with the deference commercial airlines are afforded in hiring pilots, leads the Court to conclude that Northwest's stated reasons for its decision with respect to Ludwig are non-pretextual and worthy of credence. Accordingly, Northwest's Motion for

Summary Judgment is granted as to Ludwig's Title VII and MHRA disparate treatment claim.

2. *Disparate Impact*

Disparate impact claims challenge employment practices that are "facially neutral but that fall more harshly on one group than another and cannot be justified by business necessity." *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 609, 113 S.Ct. 1701, 123 L.Ed.2d 338 (1993) (quoting *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 335-36, n. 15, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977)). To establish a prima facie case of disparate impact, the plaintiff must demonstrate that a specific employment practice has a significant impact on a protected group. *See Houghton v. SIPCO, Inc.*, 38 F.3d 953, 958 (8th Cir.1994). This is typically done through the use of statistical evidence, which reveals that the practice in question has excluded applicants due to their membership in a protected group. *See Langlie v. Onan Corp.*, 192 F.3d 1137, 1140 (8th Cir.1999), *petition for cert. filed*, (U.S. Jan. 26, 2000) (No. 99-1387), (citing *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 994, 108 S.Ct. 2777, 101 L.Ed.2d 827 (1988)). If the plaintiff meets this burden, the defendant must demonstrate that there is a "business justification" for the challenged practice. *Houghton*, 38 F.3d at 958 (quoting *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 659, 109 S.Ct. 2115, 104 L.Ed.2d 733 (1989)). The plaintiff may rebut the defendant's business necessity defense by proffering an equally effective, but less discriminatory alternative employment practice. *See Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425, 95 S.Ct. 2362, 45 L.Ed.2d 280

(1975); *see also Allen v. Entergy Corporation, Inc.*, 193 F.3d 1010, 1013 (8th Cir.1999). Throughout the analysis, the burden of persuasion remains with the plaintiff. *See Houghton*, 38 F.3d at 958.

The Court assumes, without deciding, that Ludwig has made a prima facie case of disparate impact and turns directly to the question of whether Northwest's employment practice is justified by business necessity.[5] In order to meet this burden, Northwest must demonstrate that the hiring practice has a "manifest relationship to the employment in question . . . and that it is necessary to safe and efficient job performance." *Smith v. City of Des Moines*, 99 F.3d 1466, 1471 (8th Cir.1996) (quoting *Griggs v. Duke Power Co.*, 401 U.S. 424, 432, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971), *Dothard v. Rawlinson*, 433 U.S. 321, 332 n. 14, 97 S.Ct. 2720, 53 L.Ed.2d 786 (1977)).

> The employment practice condemned by Ludwig appears to be Northwest's use of the background check during Phase I of the internal hiring process. Northwest argues that the background check has a manifest relationship to the pilot position because it measures CRM skills, which are essential qualities in a commercial pilot. (*See* Foushee Dep. at 41-44.) CRM skills, which include

---

[5] Because the business justification for Northwest's implementation of the background check is so compelling, the Court does not fully addressing whether Ludwig has made a prima facie case of disparate impact. Given the small sample size and the cursory affidavit provided by Ludwig's expert in an effort to establish disparate impact, (*see* Lorenz Aff.) the Court seriously doubts whether she has in fact made such a showing.

> stress tolerance, leadership, group cohesiveness, teamwork, personality, communications skills, and assertiveness, are generally considered to be strong predictors of successful commercial piloting, and are precisely the kind of qualities that may be gleaned from employment files. When asked how the background check related to CRM skills, Dr. H. Clayton Foushee, Jr. responded that,
>
> [P]ast behavior is a very good predictor of future behavior. In the case of the internal applicants, we felt that it was extremely important and in fact far more predictive to look at their employment history, and to see if there was any evidence in any of their records that they had difficulties dealing with other employees, had been involved in significant disputes, so on and so forth. So the relationship between that behavior, and if I find in an employment jacket that an employee has had a number of complaints filed against them by passengers or they have had disputes with their supervisors or there is some sort of history of confrontational behavior, I would be very concerned about that individual's ability to blend in and work effectively as a member of a cockpit team. And I would find that highly predictive of so-called CRM behavior.

(*See* Foushee Dep. at 42-43.) Indeed, Northwest believed that the background check would do a better job of screening out poor pilot candidates than the objective tests. (*See id.* at 24.) Therefore, the Court concludes that the background check bears a manifest relationship to the pilot position.

For similar reasons, the Court finds that Northwest also meets the second prong of the test. As previously noted, CRM skills are considered to be accurate indicators of pilot success. In other words, a pilot with low CRM skills is deemed more likely to be involved in, and cause accidents than pilots with high CRM skills. (*See* Def.'s Mem. at 2 n. 3.) Thus, the background check, which measures CRM skills, is "necessary to safe and efficient job performance." *Smith,* 99 F.3d at 1471.

Moreover, as noted above, a commercial airline is yielded a substantial degree of deference when its hiring decision affects public safety.

> When a job requires a small amount of skill and training and the consequences of hiring an unqualified applicant are insignificant, the courts should examine closely any pre-employment standard or criteria which discriminate against minorities. In such a case, the employer should have a heavy burden to demonstrate to the court's satisfaction that his employment criteria are job-related. On the other hand, when the job clearly requires a high degree of skill and the economic and human risks involved in hiring an unqualified applicant are great, the employer bears a correspondingly lighter burden to show that his employment criteria are job-related. . . . The job of airline flight officer is clearly such a job.

Boyd v. Ozark Air Lines, Inc., 568 F.2d 50, 54 (8th Cir.1977) (quoting *Spurlock v. United Airlines, Inc.,* 475 F.2d 216, 219 (10th Cir.1972)). Accordingly, the Court concludes that Northwest has met both prongs of the business necessity test.

Although required to do so in order to maintain her claim, Ludwig has not presented sufficient evidence to rebut Northwest's business necessity defense. *See Albemarle*, 422 U.S. at 425, 95 S.Ct. 2362. She argues that the MAB and PCI are less discriminatory than the background check. Even if true, Northwest has presented ample evidence that the background check is a better indicator of pilot success than the MAB and PCI. (*See* Foushee Dep. 41-44; Kern Dep. at 35-36.) Notably, Ludwig has presented no evidence to the contrary. The Court therefore concludes that she has failed to meet her burden of persuasion, particularly in light of the deference imparted to airlines in the hiring of commercial pilots. Accordingly, Ludwig's disparate impact claim is dismissed as a matter of law.

3. *Retaliation*

Ludwig alleges that she suffered from adverse employment action in direct retaliation for her decision to file an EEOC complaint, in violation of Title VII and the MHRA. As a threshold matter, Northwest's [sic] argues that Ludwig's claim should be dismissed because she failed to arbitrate the matter, as required under her collective bargaining agreement ("CBA"). The Court need not proceed too far with this analysis, for it appears that the Eighth Circuit strongly disfavors the enforcement of arbitration clauses that are imposed upon the employee, as in this case, by way of a CBA. *See Patterson v. Tenet Healthcare, Inc.*, 113 F.3d 832, 837 (8th Cir.1997) ("We have held that arbitration agreements contained within a CBA do not bar civil claims under Title VII."). The Court

therefore concludes that Ludwig's retaliation claim need not be arbitrated.

Next, Northwest argues that even if Ludwig is not required to arbitrate, her claim is nonetheless preempted by the Railway Labor Act (RLA). The RLA provides the exclusive means by which minor labor disputes – disputes in which the parties seek to enforce existing contractual rights – are resolved. *See* 45 U.S.C. § 184; *Deneen v. Northwest Airlines, Inc.*, 132 F.3d 431, 439 (8th Cir.1998). Although Northwest's rights under the CBA are tangentially involved, Ludwig's retaliation claim arises independent of the CBA. That is, by bringing a claim under Title VII and the MHRA, Ludwig seeks to enforce federal and state statutory rights, not a contractual right contemplated by the CBA. *See Benson v. Northwest Airlines, Inc.*, 62 F.3d 1108, 1115 (8th Cir.1995). Thus, because Title VII and the MHRA are the sources of the claim, rather than the CBA, the Railway Labor Act does not preempt Ludwig's retaliation claim. *See Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246, 256, 114 S.Ct. 2239, 129 L.Ed.2d 203 (1994) (holding that the RLA does not preempt claims to enforce rights independent of the collective bargaining agreement); *see also Taggart v. Trans World Airlines, Inc.*, 40 F.3d 269, 274-75 (8th Cir.1994) (holding that a state law discrimination claim is not preempted by RLA).

Accordingly, the Court turns to the merits of Ludwig's retaliation claim. Like discrimination claims under Title VII and MHRA, retaliation claims are analyzed under the *McDonnell Douglas* framework. *See Smith v. Riceland Foods, Inc.*, 151 F.3d 813, 818 (8th Cir.1998); *Hubbard v. United Press Int'l, Inc.*, 330 N.W.2d 428, 444 (Minn.1983). In order to prove a prima facie case of

retaliation, Ludwig must demonstrate that: 1) she engaged in statutorily protected activity; 2) she suffered an adverse employment action; and 3) there was a causal connection between the adverse employment action and the protected activity. *See Smith,* 151 F.3d at 818. Northwest argues that Ludwig has not established a prima facie case of retaliation because she cannot meet the second and third factors. The Court agrees.

In the statement of facts in her Memorandum in Opposition to Summary Judgment, Ludwig alleges the following instances of adverse employment action by Northwest, all of which occurred after she was eliminated from the 1995 hiring process: 1) unfair denial of her transfer request; 2) unnecessary "coaching" regarding sick leave; 3) unreasonable investigation of a potential security breach; 4) initiating several unwarranted "see me" notes; 5) requiring her – for the first time in her extended tenure at Northwest – to undergo drug testing; 6) sending her a "threatening" letter asking her to stop "enlisting support" from other Northwest personnel for her EEOC complaint; and 7) making phone calls to her home questioning her performance and attendance. (*See* Pl.'s Mem. at 13-15.) However, in the argument section of her Memorandum Ludwig focuses on Northwest's actions during the 1995 pilot hiring process as evidence of retaliation. For example, she describes the relevant adverse employment action as the "loss of a job opportunity." (Pl.'s Mem. at 24.) Her argument makes clear that the job opportunity to which she refers was her elimination from the pilot hiring process. In particular, she alleges that "Plaintiff's job performance and disciplinary record was altered to make it appear more negative.

Defendant, in essence, began to carefully scrutinize Plaintiff to find a basis to prevent her from being a Northwest Pilot." (*Id.*) These allegations, even if true, simply cannot constitute retaliation because they would have occurred before Ludwig filed her first EEOC complaint, the filing of which allegedly propagated the retaliation. Notwithstanding this bewildering inconsistency, the Court will examine each of Ludwig's post-EEOC filing allegations in determining whether she suffered any kind of adverse employment action.

Although Ludwig did not suffer from blatant adverse employment action, such as a demotion or termination, the Court recognizes that employer action need not rise to that level to be considered adverse. *See Montandon v. Farmland Indus., Inc.*, 116 F.3d 355, 359 (8th Cir.1997). At the same time, however, mere inconvenience or unhappiness on the part of the employee will not lead to a finding of actionable adverse employment action. *See id.; Enowmbitang v. Seagate Technology, Inc.*, 148 F.3d 970, 973 (8th Cir.1998). Rather, "[a]dverse employment action is that which materially alters the terms or conditions of the plaintiff's employment." *Enowmbitang*, 148 F.3d at 973. Such actions traditionally include "ultimate employment decisions," such as hiring, granting leave, discharging, promoting, and compensating. *Ledergerber v. Stangler*, 122 F.3d 1142, 1144 (8th Cir.1997); *see also Dollis v. Rubin*, 77 F.3d 777, 782 (5th Cir.1995). Based on this standard, the Court concludes that none of the instances on which Ludwig relies constitute adverse employment action.

Ludwig's first claimed instance of adverse action was Northwest's denial of her request for a supervisor transfer. Ludwig has provided very little information about

this alleged denial. In fact, she has completely failed to show that such a denial was even atypical, such that it might be considered adverse. For example, Ludwig said that she "believed" that there were Northwest employees who had successfully transferred to different supervisors. (Ludwig Dep. at 92.) Yet, she could only name one employee, Ruth Jordan, who she thought might have been granted such a transfer. (*See id.*) Even if she could establish that every employee except her had been transferred upon request, such a denial simply does not constitute a material change in her employment status because as a result of the denial, Ludwig merely maintained the status quo.

Second, Ludwig contends that she was "coached" regarding sick leave. When pressed at her deposition, however, she admitted that she had not actually been coached, and conceded that even if she had been, such action is not generally considered to be disciplinary in nature.[6] (*See* Ludwig Dep. at 93.) Given this admission, the Court would be hard-pressed to find that "attempted coaching" constituted adverse or any other kind of employment action. Moreover, there is ample evidence that Ludwig did in fact have an attendance problem. (*See* Def.'s Exs. 10-16; Emeott Aff.Ex. E.) Holding that "coaching," when warranted, constitutes an adverse employment action would emasculate employers and dissuade

---

[6] Ludwig has attempted to establish that the "attempted coaching" was in fact disciplinary because it was used against her in the pilot selection process. (*See* Ludwig Dep. at 93.) Once again, any Northwest conduct that occurred before Ludwig filed her first EEOC complaint cannot be considered retaliatory for purposes of this lawsuit.

them from not only discussing legitimate performance concerns with their employees, but also from helping their employees perform better in the future. The Court will not impose such a sweeping limitation on employers.

Third, Ludwig contends that she suffered from adverse employment action when she was investigated for an alleged security breach in Boston. Once again, although it is not disputed that she was investigated for this incident, nothing ever came of it. She was never reprimanded, formally or informally, nor were the terms of her employment altered. Even if Northwest investigated the incident with unusual vigor,[7] there was no attendant material alteration of the terms or conditions of her employment. Furthermore, Northwest is required by law to investigate potential breaches of security in order to ensure the "highest possible degree of safety in the public interest." 49 U.S.C. § 44701(d)(1)(A). The Court will not, without cause, inhibit investigations into such matters.

Fourth, Ludwig contends that she received several "see me" notes, which she perceived to be negative and damaging. Although Ludwig asserts that she received "five or six" such notes, when pressed at her deposition, she could only recall two specific instances in which she received such notes. (*See* Ludwig Dep. at 71-72.) Even if she could provide specific information about all of the notes she claimed she has received, such notes are not necessarily disciplinary or adverse in nature. (*See* Def.'s

---

[7] Ludwig's union representative, Yvonne Thompson, characterized Northwest's investigation a "Witch Hunt." (Pl's.Ex. N.)

Ex. 30.) Moreover, Ludwig has provided no information demonstrating that the notes materially, or even immaterially, changed the terms or conditions of her employment.

Fifth, Ludwig alleges that Northwest retaliated against her by forcing her to undergo two drug tests for the first time in her 25 year tenure. Northwest does not dispute that she was given the drug tests, but explains that random drug tests are administered by an outside organization, at its discretion. (*See* Tice Dep. at 51-54.) Ludwig has provided no evidence to the contrary. Because Northwest did not control the decision to test Ludwig for drugs or alcohol, such testing could not have been retaliatory in nature. Moreover, two drug tests over 25 years, regardless of when they occurred, do not evince adverse action. Without more, their timing can only be deemed a coincidence.[8]

Sixth, Ludwig alleges that Robert Tice sent her a "threatening" letter asking her to stop "enlisting support" from other Northwest personnel for her EEOC complaint. (Pl.'s Mem. at 13.) This description of the letter is incomplete and misleading. In fact, the letter asks Ludwig to stop using company resources to enlist support

---

[8] This certainly does not mean that drug testing can never be considered an adverse employment action. *See, e.g., Adams v. American Airlines, Inc.*, 2000 WL 14399, at *5 (10th Cir.2000) ("We assume, without deciding, that, if Adams could prove in this case that the IVRS was deliberately manipulated such that Adams was subjected to significantly more drug tests than she otherwise would have been absent such manipulation, such evidence could establish adverse employment action for purposes of her prima facie case of retaliation.").

and to refrain from contacting employees while they are on duty. (*See* Pl.'s Ex. C.) Tice explained that such conduct was specifically prohibited by Northwest's Rules of Conduct, with which Ludwig was required to comply. (*See id.*) Thus, through the letter, Tice was simply attempting to stop Ludwig from doing something that she was already bound not to do. This does not constitute a material alteration of the terms and conditions of her employment. Indeed, the letter is most accurately viewed as upholding the terms and conditions of her employment. Holding otherwise would completely debilitate employers by preventing them from enforcing their internal rules of conduct. Moreover, the letter was not in itself disciplinary. Rather, it merely cautioned Ludwig that further similar conduct would subject her to "potential disciplinary action." (*Id.*)

Finally, Ludwig contends that Northwest management made numerous telephone calls to her home questioning her performance and attendance. The record is completely void of any evidence supporting this contention. Even if proven, such conduct does not constitute adverse employment action. *See Munday v. Waste Management of N. Am., Inc.*, 126 F.3d 239, 243 (4th Cir.1997) (holding that an adverse employment action does not encompass a situation in which the employer essentially instructed its employees to harass the plaintiff).

In sum, although Ludwig claims that she has been retaliated against by Northwest, the instances she cites in support of her allegation are either unsupported by the record or insufficient to constitute adverse employment actions. Ludwig admits that throughout the period in question she never received a termination notice or a

Level 1 notice, was never given a decision making leave, and was never coached. (*See* Ludwig Dep. 72-73, 93-95.) Further, the actions in question never affected her salary, duties, or position at Northwest. In other words, the terms and conditions of her employment were never altered. Therefore, the Court finds that Ludwig has failed to make a prima facie case of retaliation. Accordingly, Northwest is entitled to dismissal of this count as a matter of law.

C. Negligence and Intentional Infliction of Emotional Distress

In addition to alleging Title VII and MHRA violations, Ludwig has alleged negligent training, negligent hiring, negligent supervision, and intentional infliction of emotional distress ("IIED"), all under Minnesota law. Northwest argues that Ludwig's common law claims should be dismissed because they are preempted by the MHRA and, in any event, she has not presented evidence in support of her claims.

Notwithstanding the issue of preemption, it is abundantly clear that Ludwig's negligence claims cannot stand. Her negligent training claim fails because Minnesota does not recognize such a theory of recovery. *See Mandy v. Minnesota Mining & Mfg.*, 940 F.Supp. 1463, 1473 (D.Minn.1996) (citing *M.L. v. Magnuson*, 531 N.W.2d 849, 856 (Minn.Ct.App.1995)). Ludwig's negligent hiring and supervision claims likewise fail because she has not alleged the type of injury necessary to maintain such claims, namely, bodily injury or the threat of bodily injury. *See id.* at 1471.

Plaintiff's IIED claim also fails. In order to prevail on such a claim, the plaintiff must establish that: 1) the defendant's conduct was extreme and outrageous; 2) the conduct was intentional or reckless; and 3) it caused severe emotional distress. *See Hubbard,* 330 N.W.2d at 438-439. "The operation of this tort is sharply limited to cases involving particularly egregious facts." *Id.* at 439. Ludwig has not presented such facts here.

In order to be deemed "extreme and outrageous," conduct "must be 'so atrocious that it passes the boundaries of decency and is utterly intolerable to the civilized community.' " *Id.* (quoting *Haagenson v. Nat'l Farmers Union Property and Cas. Co.,* 277 N.W.2d 648, 652 n. 3 (Minn.1979)). Northwest's actions fall far below this deliberately high standard. Ludwig's alleged emotional distress apparently stems from Northwest's "numerous false accusations, investigations and general harassment." (Pl.'s Mem. at 34.) The Court will assume that Ludwig is referring to the alleged instances of retaliation discussed above. The Court concludes that as a matter of law, these incidences, either individually or collectively, cannot be considered extreme and outrageous. Rather, the conduct complained of constituted Northwest's reasonable investigations into potential security matters and routine communications with its employee. Thus, neither the nature of the actions, nor their content can be viewed as utterly intolerable to the civilized community. *See Hubbard,* 330 N.W.2d at 439-40 (holding that dismissal as a matter of law was appropriate when the conduct constituted no more than employment discipline and written and verbal criticism of the plaintiff's job performance,

even if intended to harass). Indeed, the civilized community would probably prefer that Northwest be overly careful when it comes to airline safety.

Even if Ludwig could establish that Northwest's conduct was extreme and outrageous, there is no proof that she has suffered from "severe emotional distress." The only evidence of any physical reaction to her situation comes from her deposition in which she claims to have experienced emotional upset, distress, loss of reputation, decreased energy, sleeplessness, and the like. (*See* Ludwig Dep. at 97-100.) These symptoms, even if substantiated, do not rise to the level necessary to maintain this claim. Ludwig has never seen a doctor, missed work, or filed a worker's compensation claim as a result of her symptoms. Therefore, it can hardly be said that she suffers from distress "so severe that [she cannot] be expected to endure it." *Id.* at 439. Thus, the Court concludes that as a matter of law, Ludwig has not established the elements necessary to maintain a claim of intentional infliction of emotional distress.

CONCLUSION

For the foregoing reasons, and upon all of the files, records, and proceedings herein, the Court grants Defendant Northwest's Motion for Summary Judgment.

Accordingly, **IT IS HEREBY ORDERED** that:

1. Defendant Northwest Airlines, Inc.'s Motion for Summary Judgment is (Clerk Doc. No. 56) is **GRANTED**; and

2. Plaintiff Susan Ludwig's Complaint (Clerk Doc. No. 1) is **DISMISSED WITH PREJUDICE.**

LET JUDGMENT BE ENTERED ACCORDINGLY.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 00-2258	*	Order Denying Petition
Susan Ludwig,	*	for Rehearing and for
	*	Rehearing En Banc
Appellant,	*	
	*	(Filed Feb. 22, 2001)
v.	*	
	*	
Northwest Airlines, Inc.,	*	
	*	
Appellee.	*	

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

(5128-010199)

February 22, 2001

Order Entered at the Direction of the Court:

/s/ Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

[LOGO]

U.S. EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION
Minneapolis Area Office

330 Second Avenue South, Suite 430
Minneapolis, MN 55401-2224
PH: (612) 335-4040
TDD: (612) 335-4045
FAX: (612) 335-4044

Charge Number: 265961382
FEPA Number: ER19961687

Susan L. Ludwig
P. O. Box 380870
Cambridge, MA 02238

Charging Party

vs.

Northwest Airlines
5101 Northwest Drive
St. Paul, MN 55111-3034

Respondent

DETERMINATION

Under the authority vested in me by the Commission, I issue the following determination as to the merits of the subject charge.

The Respondent is an employer within the meaning of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e, *et seq.*, and timeliness, deferral, and other requirements for coverage have been met.

The Charging Party alleges that she was discriminated against in violation of Title VII of the Civil Rights Act of

1964, as amended. The Charging Party alleges that she was discriminated against on the basis of her gender/ female and in retaliation for her complaint that there was gender discrimination in the 1994 pilot hiring process. The Charging Party alleges that she was discriminated against and retaliated against when she was denied the opportunity to interview, denied the opportunity to take the simulator test for the position of pilot, harassed, treated differently than her male co-workers during the pilot hiring process, and notified on November 28, 1995, that she would not be considered for the pilot position.

Examination of the evidence, both documentary and testimonial, indicates that there is reasonable cause to believe that violations of the statutes have occurred. The Respondent discriminated against the Charging Party by applying screening criteria during the 1995 internal pilot hiring process to her that was different than that applied to her male co-workers who were promoted to the pilot position.

The evidence establishes that the Charging Party is a forty-five year old White female union employee who has been employed with the Respondent since January 1974. Evidence supports the conclusion that the Charging Party, Susan Ludwig, was not promoted to the pilot training program positions open in 1995 because of her gender. Evidence establishes that the Respondent promoted less qualified male co-workers to the pilot training program positions open in 1995. Evidence establishes that during the 1995 pilot hiring process, the Charging party held a valid Air Transport Pilot License, a full Flight Engineer Certificate, had completed over 1800 hours of flight time as a pilot or second in command, and was

more qualified or as qualified in the areas of attendance and job performance than the successful male candidates.

I therefore conclude that the Respondent, willfully, and with reckless disregard of the requirements of the law, discriminated against the Charging Party as alleged.

Based on the evidence as outlined above, I recommend that the Commission issue a reasonable cause finding that the Charging Party was discriminated against on the basis of her gender.

I have determined that the evidence obtained during the investigation does not establish violations as to the following: Based upon the Commission's investigation, the Commission is unable to conclude that the information obtained establishes that the Charging Party was retaliated against for her complaints of gender discrimination in the 1994 internal pilot hiring process. This does not certify that the Respondent is in compliance with the statues. [sic] No finding is made as to any other issues that might be construed as having been raised by this charge.

Section 706(b) of Title VII requires that if the Commission determines that there is reason to believe that violations have occurred, it shall endeavor to eliminate the alleged unlawful employment practices by informal methods of conference, conciliation, and persuasion. Having determined that there is reason to believe that violations have occurred, the Commission now invites the parties to join with it in a collective effort toward a just resolution of this matter. An EEOC representative will be in contact with each party in the near future to begin the conciliation process. Disclosure of information obtained by the

Commission during the conciliation process will be made in accordance with Section 706(b) of Title VII and Section 1601.26 of the Commission's Procedural Regulations. If the Respondent declines to enter into settlement discussions, or if for any other reason the Commission's representative is unable to secure an acceptable settlement, the Director shall so inform the parties in writing and advise them of the court enforcement alternative available to the charging party, aggrieved persons, and the Commission.

On behalf of the Commission,

February 4, 1998 — /s/ Michael J. Bloyer
Date — Michael J. Bloyer
Area Director